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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935
No. 47

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

BRIEF FOR PETITIONER

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No. 47

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A. B. MULLER,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

This case is here on writ of certiorari granted June 3, 1935, to review a final judgment of the Supreme Court of the State of Minnesota affirming a judgment and decree of the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota (R. 108, 106-107). The judgment and decree so affirmed dismissed the action, which had been brought by the petitioner against the respondent upon two contracts (R. 95-96, 2-9).

A prior petition for writ of certiorari in this case was granted by this Court on December 3, 1934 (R. 91). When the case was called for argument it appeared that no final judgment had been made by the Minnesota courts, and the

writ was dismissed on February 18, 1935, as improvidently granted (R. 92).

Opinions of the Courts Below

The opinion of the Supreme Court of Minnesota filed April 9, 1935, affirming the judgment and decree of the District Court (R. 104) is reported in 260 N. W. 320 but is not yet reported in the official reports. This opinion was rendered upon the authority of an opinion of the same court filed June 29, 1934, affirming the order of the District Court denying the petitioner's motion for judgment notwithstanding the decision of the District Court or for a new trial (R. 77-83, 72). The latter opinion is reported in 192 Minn. 212 and 255 N. W. 845. The memoranda written by the District Court in connection with its decision (R. 57-63) and with its order denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 73) are both unreported.

Jurisdiction

A final judgment was entered by the Supreme Court of the State of Minnesota in this case on April 11, 1935 (R. 106-107). The sole question decided by the Minnesota courts was the sufficiency of the defense pleaded in respondent's answer that the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) made the contracts in suit unenforceable. The jurisdiction of this Court to review the judgment is invoked under Section 237 (b) of the Judicial Code as amended (Act of Congress, Feb. 13, 1925, c. 229, § 1, 43 Stat. 937). See *Nutt* v. *Knut*, 200 U. S. 12; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165.

Statement

This is an action brought by the petitioner, Fox Film Corporation, the owner and distributor of motion picture films, against the respondent, A. B. Muller, a motion picture exhibitor, upon two contracts made on or about September 6, 1929 (R. 2-9, 22). Each of these contracts* provided, among other things, that the petitioner should license the exhibition by the respondent of designated films and that the respondent should exhibit the films under the license and pay the petitioner stipulated sums for such license (Appendix A, pp. 28-30, *infra*). The petitioner, in accordance with the terms of the contracts, made such films available for the respondent's use and notified the respondent in writing that such films were available and tendered them, and also shipped certain of such films to the respondent at his request, but the respondent refused to perform his part of the contract (R. 6, 8, 22).

Respondent asserted that the contracts violated the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) and were illegal (R. 22). In connection with this defense it was stipulated at the trial that the printed portions of each of the contracts sued upon are substantially the same as the contract construed by the decision in *United States* v. *Paramount Famous Lasky Corporation et al.* (34 F. (2d) 984, aff'd 282 U. S. 30); that paragraph Eighteenth of each of the contracts sued upon, known as the "arbitration clause", is the same as paragraph Eighteenth of the contract construed by that decision; that this paragraph had been held by that decision to be illegal

*Photostatic copies of these contracts are in the record as plaintiff's Exhibits A and B (R. 75-76). For the convenience of the Court printed copies are set forth in Appendix A hereto.

and unenforceable; and that the petitioner had been one of the defendants in that case (R. 22-23).

The contract construed in the *Paramount* case is a form contract known as the "Standard Exhibition Contract" (34 F. (2d), pp. 985-986; Appendix A, p. 28, *infra*). The arbitration clause in paragraph Eighteenth of the standard form provides for compulsory arbitration of all claims and controversies arising under the contract (Appendix A, pp. 39-41, *infra*).

In the *Paramount* case the United States sued under Section 4 of the Sherman Anti-Trust Act to enjoin the petitioner and several other distributors from further engaging in a conspiracy in restraint of trade, described in the petition (see excerpt printed in Appendix B, pp. 59-60, *infra*), in violation of Section 1 of that Act* (34 F. (2d) 984). On January 21, 1930, the United States District Court for the Southern District of New York made a decree, a copy of which is printed in Appendix C (pp. 61-66, *infra*). The nature of the conspiracy charged in the Government's petition, and the terms of the decree, will be later discussed in connection with the argument (*infra*, pp. 10-14). It is sufficient to say, for purposes of this statement, that the Minnesota courts, following the contention of respondent, interpreted the *Paramount* case as declaring not only the coercive arbitration provisions but

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*Section 1 provides as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

the whole of the contracts in suit illegal; while petitioner contends that the illegality declared was confined to parts of the contracts providing for compulsory arbitration and that the decree expressly adjudged the terms providing for reciprocal engagements for the licensing of, and taking and paying for, motion picture films to be enforceable by either party. The decree of the District Court was affirmed by this Court (282 U. S. 30).

After the decision of this Court in the *Paramount* case, all machinery, methods and rules for arbitration under the Standard Exhibition Contracts were abolished (R. 23).

At the time of the decree in the *Paramount* case many thousands of Standard Exhibition Contracts were outstanding (R. 57; 34 F. (2d), pp. 984-986), including those involved in the present case (R. 3, 7, 22; Appendix C, p. 66, *infra*). There ensued numerous conflicting decisions in actions like the present one commenced upon Standard Exhibition Contracts by distributors against exhibitors who refused to accept or refused to pay for films (R. 57-58).

In the following cases, it was held that the distributors could enforce provisions of the Standard Exhibition Contract similar to those upon which this action is based, notwithstanding the illegality of the coercive arbitration provisions: *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. (2d) 64 (C. C. A., 4th Circ.); *Fox Film Corp.* v. *Ogden Theatre Co., Inc.*, 82 Utah 279, 17 P. (2d) 294; *Fox Film Corp.* v. *Buchanan*, 17 La. App. 285, 136 So. 197; *Fox Film Corp.* v. *Bailly*, 61 S. D. 22, 246 N. W. 111; *Walker Theatre Co.* v. *R. K. O. Distributing Corp.*, 98 Ind. App. 331, 189 N. E. 162; *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Co.*, 42 F. (2d) 873 (D. C., D.

Colo.); and *Metro-Goldwyn-Mayer Distributing Corp.* v. *Cocke*, 56 S. W. (2d) 489 (Tex. Civ. App.).

In the following cases the contrary was held on the theory that the entire contract is unenforceable: *Vitagraph, Inc.* v. *Theatre Realty Co., Inc.*, 50 F. (2d) 907 (D. C., E. D. Pa.); *Fox Film Corp.* v. *Tri-State Theatres*, 51 Idaho 439, 6 P. (2d) 135; *Fox Film Corp.* v. *C. & M. Amusement Co.*, 58 F. (2d) 337 (D. C., S. D. Ohio, E. D.); *Universal Film Exchanges, Inc.* v. *West*, 163 Miss. 272, 141 So. 293; *United Artists Corp.* v. *Odeon Building, Inc.*, 212 Wis. 150, 248 N. W. 784; *United Artists Corp.* v. *Piller*, 62 N. D. 289, 244 N. W. 20; and *First National Pictures, Inc.* v. *Pappe*, 170 Okl. 279, 39 P. (2d) 526.

In the present case, following a trial before a Judge without a jury (R. 50), the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota, rendered a decision dismissing the action on the sole ground that the contracts sued upon were "null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 56). The petitioner made a motion in the Minnesota District Court for judgment notwithstanding the decision or for a new trial, and the motion was denied (R. 70-72). On appeal the Supreme Court of Minnesota affirmed the order denying the motion (R. 74, 89) and denied an application by the petitioner for reargument (R. 88, 84-87). After the prior writ of certiorari had been dismissed by this Court as improvidently granted, the District Court entered a judgment and decree adjudging that each of the contracts sued upon is "null and void and illegal, and in violation of the Sherman Anti-Trust Act," and dismissing the action; and, on appeal, the Supreme Court of Minnesota entered a final judgment affirming the judgment of the District Court (R. 95-97, 102-103, 106-107).

Specification of Errors

The Minnesota courts erred:

1. In sustaining the respondent's defense of illegality;

2. In holding that the contracts sued upon are rendered unenforceable in this action by the Sherman Anti-Trust Act;

3. In holding that the contracts sued upon are illegal and void in their entirety; and

4. In failing to correctly apply the decision in the *Paramount* case (Appendix C; 34 F. (2d) 984, aff'd 282 U. S. 30).

ARGUMENT

The contractual provisions upon which this action is based are not rendered unenforceable by the Sherman Anti-Trust Act.

The Minnesota courts recognized that the only terms of the contracts here involved which were in themselves illegal were contained in the provisions for compulsory arbitration. While respondent's amended answer (R. 9-21) contained allegations of illegality broad enough to cover other provisions of the contract, these were not sustained. The only evidence in the case consisted of the two contracts in suit (Exs. A and B, R. 75, 76, reprinted for convenience in Appendix A of this brief), a stipulation of facts (R. 21-24) and some wholly inconsequential testimony on the part of the respondent (R. 25-49). The stipulated facts bearing on the question of illegality (R. 22-24) were confined to admissions that the printed portion of each of the contracts in suit is substantially the same as the contract construed in the *Paramount* case (par. 4), that Paragraph 18 in each of the contracts in suit is the same as Paragraph 18 in the contract construed in the *Paramount* case, and that "said Paragraph 18 was held by said decisions to be illegal and unenforceable" (par. 5), that the president of an unincorporated association of which respondent was a member participated to the extent described in the adoption of the Standard Exhibition Contract and that this association ratified the agreement to use it, and "that the adoption, ratification and use of said contract as in this paragraph set forth was secured by the means and in the manner set forth in the decision" of

this Court in the *Paramount* case (par. 8). The trial court found these facts (Findings Nos. XI, XII, XV, XVI, XVIII, R. 55, 68-70). He included (No. XIII, R. 55-56) a conclusion in the guise of a finding of fact that "the provisions in said contracts with regard to arbitration are not divisible covenants, but form an essential part of the consideration for the making of said contracts, and that without such arbitration clause, it is doubtful if said contracts would have been made; that the said illegal arbitration provisions the said contracts contained, rendered the entire contracts illegal and void".*

The Supreme Court of Minnesota "interpreted" the decree in the *Paramount* case as declaring "not only the arbitration clause illegal but the whole of the contract" (R. 81). The chief question before this Court is, therefore, the correct interpretation of the *Paramount* case.

The petitioner contends:

(1) That the decree in the *Paramount* case declared illegal only the provisions of the contracts which imposed upon exhibitors a system of compulsory arbitration of disputes, and affirmatively provided for the enforcement of the terms of the contract expressing the reciprocal engagements of the parties for licensing of, and taking and paying for, motion picture films;

(2) That, even apart from the intention manifested by that decree, the illegal features of the contracts are sev-

*This so-called finding of fact, which is intermingled with and dependent upon the ultimate federal question in the case, is of course not conclusive upon this Court in any way. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591-594; *Stanley* v. *Schwalby*, 162 U. S. 255; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Truax* v. *Corrigan*, 257 U. S. 312, 324-325.

erable and do not vitiate the legal part or prevent its enforcement;

(3) That enforcement of the part of the contract relating to licensing of, and taking and paying for, films will not contravene the Sherman Act within the decisions of this Court.

1. *The Paramount case.*

The "conspiracy" condemned in the *Paramount* case was one "to coerce and to require" exhibitors of motion picture films: (1) "to submit to arbitration" disputes arising under the Standard Exhibition Contracts; (2) to "surrender and to waive" their rights to have such disputes "settled and determined" by any court; and (3) "to comply with any award" rendered in any arbitration proceeding without recourse or appeal to the courts (Extract from petition, Appendix B, *infra*, pp. 59-60). The Standard Exhibition Contract in itself was not condemned. The understanding and agreement between the defendant distributors to refuse to enter into any licensing contract except on the terms agreed upon by them, or to supply films to any exhibitor "having a contract therefor", in the event of failure of the exhibitor to comply with such terms and conditions, was attacked only because it was a means adopted by the distributors "to carry out and to accomplish the aforesaid purposes and objects" (*id.*, p. 60). Section I of the decree, adjudging that "the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion pictures" the Standard Exhibition Contract, "the adoption by the defendants of the Rules of Arbitration", and "all the activities and agreements of

said defendants by means of which they have collectively coerced adoption and compliance with" the Standard Exhibition Contract and Rules of Arbitration, "constitute a conspiracy" in violation of the Sherman Act (Appendix C, *infra*, pp. 61-62), is consonant with the definition of the conspiracy in the Government's petition as above stated.

Accordingly the decree in Section II, providing the injunctions, bore only upon such features of the contract as directly tended to promote the conspiracy denounced (Appendix C, *infra*, pp. 62-63). After enjoining the defendants in general terms (par. 1) from further engaging in "said conspiracy", or any similar conspiracy, or (par. 2) from doing any act for the purpose or with the effect of carrying out "the purpose of said conspiracy", the section proceeded in its subsequent paragraphs to impose specific injunctions. These related exclusively to the compulsory arbitration feature.

The defendants were enjoined from entering into any agreement "embodying the provisions of Paragraph 'Eighteenth' " of the Standard Exhibition Contract or the "Rules of Arbitration" (par. 3); from enforcing any of such provisions against "any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph" (par. 4); and from doing certain specific things to compel compliance by exhibitors with such arbitration provisions of any such "existing contracts" (pars. 5, 6, 7) (Appendix C, pp. 62-63, *infra*).

Since all or practically all of the many thousand of "existing contracts" were in the standard form (see 34 F. (2d), p. 987; R. 57), the fact that the decree enjoined the distributors from enforcing paragraph Eighteenth of the "existing" contracts shows that the whole Standard Ex-

hibition Contract was not regarded as illegal but that its provisions, other than the compulsory arbitration feature, were regarded as enforceable by them just as if the illegal provisions had been deleted. If the whole Standard Exhibition Contract had been regarded as illegal, the decree would have enjoined enforcement of each of its provisions instead of enjoining enforcement of one paragraph only.

Any idea that the conduct condemned was not limited to the imposition on the trade of a system of compulsory arbitration, but was more broadly the imposition of a uniform type of license contract, is dispelled by paragraph 9 (*id.*, pp. 64-65, *infra*). That paragraph enjoins the defendants from acting upon or entering into "any understanding, arrangement, combination, conspiracy or agreement" among other things "to fix in advance any terms or conditions" upon which distributors shall enter into any licensing contract, only "if the purpose or effect" is "to coerce or require" exhibitors to submit to arbitration, waive their rights to court determination or comply with an award in arbitration proceedings.

The intention to save the provisions of the Standard Exhibition Contract expressing the mutual obligations of the parties with respect to the licensing of films appears even more strongly in Paragraph 8 of Section II. That not only contemplated continued performance of these portions of the contract, but also in effect *required* such continued performance on the part of the defendant distributors, including the petitioner. It enjoined the defendants:

> "8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to

> comply with any provision of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' of May 1, 1928, or of said 'Rules of Arbitration' dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' or of said Rule IV of said 'Rules of Arbitration'" (*id.*, pp. 63-64, *infra*).

Since the "service" which was being rendered by the distributors to the exhibitors at the time of the decree was service pursuant to the Standard Exhibition Contract, the decree by enjoining the distributors from suspending such service in effect required the distributors to continue to perform such contract. This is shown also by Paragraph 9 which enjoined the defendants, under certain conditions, from continuing to act upon any agreement to require the deposit of security as a condition for "continuing to perform any such contract which has not been breached by the exhibitor" (*id.*, pp. 64-65, *infra*).

Read in the light of the specific provisions of Section II of the decree above referred to, the meaning of Section III is plain. It reads:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree" (*id.*, p. 65, *infra*).

Paragraph 8 of Section II provided that the licensing features of the contract are enforceable against the

distributors. The corollary that they are also enforceable against the exhibitors is implicit therein. But Section III is an express provision to that effect. Since the contractual obligations between the distributors and the exhibitors were those contained in the Standard Exhibition Contract, the quoted clause amounts to a reservation of the rights of the distributors to continue performance *and enforcement* of the provisions of that contract other than the compulsory arbitration provisions.

The foregoing analysis of the decree in the *Paramount* case shows, we submit, that it is an adjudication that, except for the coercive arbitration feature, the Standard Exhibition Contract is legal, and is enforceable by either party. This Court, affirming that decree, termed it an "appropriate" injunction against future action under the unlawful plan (282 U. S. pp. 41-42). It follows that the decision of the Minnesota courts that the contracts sued upon are illegal in their entirety and unenforceable finds no support in the decision in the *Paramount* case, but is in conflict with it.

2. *The question of severability*

By holding the Standard Exhibition Contract enforceable, except for the compulsory arbitration provisions, the decision in the *Paramount* case necessarily held, we submit, that such provisions are severable. This was pointed out by the Circuit Court of Appeals for the Fourth Circuit in *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. (2d) 64, where, in holding that the distributor could sue upon the contract notwithstanding the illegality in the arbitration clause, it said, at page 66:

> "Again we think that the learned judge below was in error for another reason, and that is that the contract, as far as is related to the lawful and unlawful parts, was divisible. That this was the opinion of Judge Thacher, in the case of *United States* v. *Paramount Famous Lasky Corporation, supra,* is shown by the excerpt from his decree."

But quite apart from the effect of the *Paramount* case, the illegal provisions of this contract are severable from the legal ones according to principles of general law, and do not "taint" the whole.

A contract is not necessarily illegal in its entirety because it contains an illegal arbitration provision (see, *e.g., Saratoga State Waters Corp.* v. *Pratt,* 227 N. Y. 429, 125 N. E. 834; *Johnston* v. *Franklin Kirk Co.,* 83 Ind. App. 519, 148 N. E. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Mathews,* 64 Ark. 398, 42 S. W. 902), or an illegal provision in restraint of trade (see, *e.g., Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64; *Western Union Telegraph Co.* v. *Pennsylvania Co.,* 129 Fed. 849, 867, 868 (C. C. A., 3rd Circ.); *Price* v. *Greene,* 16 M. & W. 346 (Exchequer Chamber 1847). Relying upon numerous cases involving illegal arbitration provisions or illegal restraints of trade, the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court of Utah, in sustaining actions by distributors upon the Standard Exhibition Contract, held that the illegal arbitration provisions are severable and do not vitiate the entire contract. *Paramount Famous Lasky Corporation* v. *National Theatre Corporation* and *Fox Film Corporation* v. *Ogden Theatre Co., Inc., supra.* The former court said (49 F. (2d), p. 66):

"* * * That such a provision, as the one in question here, is separable from the rest of the contract, is borne out by a number of decisions. [Citations]"

* * * * * * * *

"It has been expressly held that, where agreements in restraint of trade were unlawful in part, they were enforceable as to the parts that were not unlawful, and this holding runs back to the earliest authorities. [Citations]"

The latter court said (17 P. (2d), p. 297):

"Arbitration provisions in contracts are very generally held to be severable from the body of the contract. Arbitration provisions of the kind in question, that is, those types that are in no wise connected with the promises each party makes to the other, but which on the contrary look to the future and provide a method of arbitrating disputes that may arise, are by practically all courts held to be severable provisions. In fact an arbitration provision as to disputes that may arise in the future is treated as if it were a separate contract in and of itself. [Citations] An agreement in a contract to arbitrate disputes that may arise is not a part of the substance of the contract. It pertains to remedy only, and is collateral to the contractual matters. The contract was not made for the purpose of bringing about the arbitration. [Citations] In fact every decision that holds invalid the provision that arbitration is a condition precedent to commencing an action impliedly holds the provisions severable, not a part of the consideration and not of the gist of the contract. *Blodgett Co.* v. *Bebe Co.*, 190 Cal. 665, 214 P. 38, 26 A. L. R. 1070.

* * * * * * * *

> "Provisions in restraint of trade are held by most courts to be severable from the body of the contract and no bar to enforcement of the remaining portion of the agreement, especially in cases where one party has obtained the benefits of performance by the other. There are cases in which contractual provisions that are felonious or *malum in se* may invalidate the whole contract, but the provision at bar is not in that category. It is, however, a provision that is tainted with evil design and deserves no praise. But it is clearly severable, and we are of the opinion that it comes within the rules laid down by a great majority of the decisions concerning similar provisions. [Citations]"

The illegal portion of a partly illegal bilateral contract is severable and the legal portion is enforceable where legal promises on two sides are apportioned to one another and the illegal portion does not go to the essence of the bargain. See 3 *Williston, Contracts,* §§ 1782, 1780; *American Law Institute, Restatement of the Law of Contracts,* § 607. The test of severability is concisely stated in Section 1782 of *Williston* as follows:

> "If the legal portion of a bilateral contract is severable, legal promises on one side being wholly supported by legal promises on the other, and the illegal portion of the contract does not go to its essence, the legal part may be enforced."

and in the "Comment" under Section 607 of the *Restatement* as follows:

> "If the legal portion of a bilateral bargain is severable, legal promises on two sides being apportioned to one another, and the illegal portion of the

bargain does not go to its essence, the legal part may be enforced."

Application to the Standard Exhibition Contract of the test of severability stated above demonstrates that the illegal arbitration provisions are severable and the provisions upon which this action is based are enforceable, for it is clear on the face of the contract that the legal promises on one side are wholly supported by legal promises on the other and that the illegal portion of the contract does not go to its essence.

The contract is primarily one licensing the exhibition of motion picture films (see pars. Second and Twenty-second). The primary promise on the part of the distributor is to grant the license and deliver the stipulated films (see pars. Second and Seventh). The primary promise on the part of the exhibitor is to exhibit the films and "to pay for such license" the stipulated sums (see pars. Third, Fourth and Fifth). There is nothing illegal in these promises. The object of the distributor is to receive the sums stipulated as payment "for such license" and the object of the exhibitor is to obtain the license for which he promises to pay such sums (see pars. Second, Fourth and Fifth). There is nothing illegal in these objects.

The legal promises on one side of the contract with respect to the licensing of, and taking and paying for, films are wholly supported by legal promises on the other. Paragraph Eighteenth, the clause involved in the *Paramount* case, contains a complete set of reciprocal obligations which could have been substantially written as a complete separate contract with equal effect. It imposes reciprocal obligations to submit to and abide by the results of arbitration, couched in the language of mutual promises. The form

and content of the paragraph show clearly that the promises of the parties with respect to arbitration are "apportioned to one another". It necessarily follows that the legal promises with respect to the licensing of films are similarly apportioned.

The arbitration provisions do not go to the essence of the contract. In the normal operation of the contract its objects would be completely attained without their aid. These provisions have no direct bearing upon these objects. They do not enlarge the substantial scope of the contract. They do not create substantive rights. They provide merely a means of enforcing the substantive rights and are to be invoked only in case of dispute. Their deletion does not affect the substantive rights but merely leaves such rights subject to enforcement by the ordinary means provided by law.

Nothing in the opinion of the Minnesota court indicates any doubt that in the Standard Exhibition Contract the legal promises on the one side with respect to the licensing of, and taking and paying for, films are wholly supported by legal promises on the other. The sole ground upon which the court rested its conclusion of the indivisibility of the contract was that the circumstances indicated that the compulsory arbitration feature was regarded by the distributors as very important and was strongly desired by them, and therefore must be regarded as of the essence of the contract. But this is not the test. As we have above pointed out, the essence of the contract is embraced in its licensing feature.

For present purposes, however, it is only necessary to say that all of the reasons assigned by the Minnesota court (R. 82-83) relate to the importance which the *distributors* are assumed to have attached to the compulsory arbitration

feature. The argument amounts to saying that a party may not sue on one promise, performance of which would be wholly legal, because *he* is not entitled to get another advantage which another term of the contract purported to give him. A very similar contention was disposed of by this Court in *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179. There the plaintiff sued to recover an instalment of the purchase price due under a contract for the sale of certain vessels to the defendant. The defendant relied upon a covenant on its own part, to maintain the same rates as those charged by the plaintiff, as making the contracts illegal as in restraint of trade (p. 183). In holding the defense insufficient, this Court said, at pages 185-186:

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into consideration for that which was the consideration of his debt and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Bank of Australasia* v. *Breillat*, 6 Moore, P.C. 152, 201; *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we

deem it insufficient to make the whole agreement void."

In *Nutt* v. *Knut*, 200 U. S. 12, the plaintiff, an attorney, sued to recover a contingent fee under a retainer contract by which he was retained to prosecute a claim against the United States and was given a right to a fee equal to 33⅓% of the amount allowed on the claim and also a right to a lien upon the claim. The defendant interposed a defense to the effect that the contract was null and void under section 3477 of the Revised Statutes which declares "null and void all transfers and assignments of a claim upon the United States". This Court held that the provision giving the plaintiff a lien was within the scope of the statute and therefore bad, but nevertheless held the defense insufficient, saying, at page 21:

> "* * * There is a provision in the contract of 1882 which can stand alone and which was not in violation of the statute, namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a sum equal to 33⅓ per cent of the amount allowed on the claim. *Wylie* v. *Cox*, 15 How. 415; *Wright* v. *Tebbitts*, 91 U. S. 252; *Taylor* v. *Bemiss*, 110 U. S. 42. Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the Government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could

> have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions.* * *"

3. Enforceability, under the decisions of this Court, of the severable provisions sued upon.

Since the illegal arbitration provisions of the Standard Exhibition Contract are severable, the remainder of the contract is enforceable unless its enforcement will contravene the Sherman Anti-Trust Act under the decisions of this Court.

The combination which was held to violate the Sherman Anti-Trust Act in the *Paramount* case was a combination of distributors for the purpose of imposing compulsory arbitration upon the exhibitors. The only provisions of the Standard Exhibition Contract which contributed to the accomplishment of this purpose are the compulsory arbitration provisions. The Standard Exhibition Contract is not the arrangement by which the combination came into existence, but is merely collateral to such arrangement (Appendix C, Sec. I, pp. 61-62, *infra*.). There is no necessary connection between the provisions sought to be enforced in this action and such arrangement, and the enforcement of such provisions will have no tendency to accomplish the purpose of the combination.

The decisions of this Court show that under such circumstances the Sherman Anti-Trust Act affords no defense to an action upon contract. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165; *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248.

In *Connolly* v. *Union Sewer Pipe Co., supra,* this Court sustained a judgment for the price of sewer pipe sold and delivered, notwithstanding the fact that the plaintiff was an illegal combination organized for the purpose of preventing competition in the manufacture and sale of sewer pipe and limiting the production of and increasing and controlling the wholesale and retail price of the product, and the fact that the combination was acting for such purpose in making the sales upon which the action was founded. In the majority opinion this Court said, at page 551:

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

In *Wilder Manufacturing Co.* v. *Corn Products Refining Co., supra,* this Court affirmed a judgment for the price of glucose sold and delivered by a combination which was assumed to have been illegally organized with the

object of monopolizing all dealings in the product, and to have unreasonably advanced the price of the product to the injury of the public and to have driven competitors out of the field by means of an offer to customers of a percentage of profits upon the condition of their dealing exclusively with it. This Court apparently assumed that this condition was a condition of the contract of sale. It nevertheless held the contract of sale to be legal and the obligation to pay the purchase price enforceable.

In *Small Co. v. Lamborn & Co., supra*, this Court affirmed a judgment for the difference between the contract price of sugar which the defendant had contracted for and refused to accept and the amount obtained by the plaintiff upon resale, notwithstanding the facts that the plaintiff and others had entered into an illegal combination to manipulate trade in refined sugar with a view to increasing the price, that the contracts sued upon were made during the life of the combination and that the plaintiff conformed the terms of sale to the standards sanctioned by the combination.

The Supreme Court of Minnesota relied (R. 83) upon *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, in which this Court, by a divided vote, affirmed a judgment which denied recovery by the representative of an illegal combination for the price of wall paper sold and delivered to a dealer. But that case is clearly distinguishable. There, not only was the purpose of the combination to monopolize and prevent competition in the manufacture and sale of, limit the production of and increase the wholesale and retail price of a product; but the

very agreement sued upon was a part of the illegal plan. It obligated the dealer to buy from no one but members of the combination and to refrain from selling to others at less than scheduled prices under penalty of being unable to buy wall paper and being driven out of business. It was admitted on demurrer that "the immediate, intended and direct effect of the said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition" (p. 250), and that the prices sued for were "the prices fixed and determined in pursuance of and by the combination" and were "unreasonable, unjust and excessive and at least one-half more than they would otherwise have been" and "above the fair market price of such merchandise by more than the amount sought to be recovered" (pp. 251, 253). In the majority opinion of this Court it was concluded that the plaintiff, representing an illegal combination, could not have a judgment for the amount of the account sued on "because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination" (pp. 266-267). The principal reasons for this conclusion were thus stated in the opinion:

> "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination.
>
> * * * * * * *

> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends." (pp. 261-262)

In the *Wilder* case, *supra*, this Court approved the ruling in the *Connolly* case and, in distinguishing the ruling in the *Continental Wall Paper* case, said (236 U. S. p. 177) that that case

> "* * * was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (*a*) the relations of the contracting parties to the goods sold, (*b*) the want of real ownership in the seller, (*c*) the peculiar obligations which were imposed upon the buyer, and (*d*) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale".

The *Continental Wall Paper* case held merely that enforcement of a contract will be denied where it would aid an illegal combination "to accomplish forbidden ends." The enforcement of the contract involved in the present case will obviously not accomplish or have any tendency to promote the "forbidden ends" of the combination which was condemned in the *Paramount* case.

CONCLUSION

The judgment below should be reversed, and the petitioner should be adjudged entitled to recover the sum of $1,838.42 with interest and costs and disbursements in accordance with the stipulation of facts (R. 23, fol. 68).

Respectfully submitted,

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

CHARLES E. HUGHES, JR.,
Of Counsel.

APPENDIX A

Contracts Sued Upon

Plaintiff's Exhibit A

PAGE ONE

AGREEMENT, made in one or more counterparts between FOX FILM CORPORATION, a corporation (hereinafter referred to as "the Distributor"), party of the first part, and the Exhibitor hereinafter named and referred to as the "Exhibitor," operating the theatre or theatres hereinafter designated, party of the second part,

WITNESSETH: The parties hereto agree as follows:

Warranty as to Form

FIRST: The Distributor warrants that there is contained herein all of the numbered Articles of the "Standard Exhibition Contract" agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purposes of this Article.

License

SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule.

(b) In case any of such photoplays (except photoplays which shall be "roadshown") shall not be "generally released" by the Distributor for distribution in the United States during the period beginning August 19, 1928 and ending August 17, 1929, such photoplays shall be excepted and excluded from this license unless the Exhibitor shall give written notice to the Distributor not later than thirty days after such last mentioned date that the Exhibitor elects to exhibit all of such photoplays hereunder. If such notice be given the Distributor shall deliver and the Exhibitor shall exhibit such photoplays as and when available for exhibition hereunder, except that any of such photoplays not so "generally released" within two years after such last mentioned date shall be also excepted and excluded. The Distributor may exhibit or license the exhibition of any photoplays excepted and excluded as aforesaid when and where desired by the Distributor, and all claims or causes of action in respect thereof are hereby expressly waived by the Exhibitor.

Time and Place of Exhibition

THIRD: The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibition of such photoplays, and for no other purpose.

Payment

FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous exhibitor of the positive print thereof.

Payment on Account

FIFTH: Payment, if any, made upon the execution hereof by the Exhibitor shall be deemed payment on account of the sums last payable hereunder.

Protection and Run

SIXTH: During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise

provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

Delivery and Return of Prints

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder.

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor, reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that

the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

Selection or Designation of Play Dates

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows:

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and/or protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor, are not open for the Exhibitor, then the exhibition date

or dates shall be designated as provided in the following paragraphs "A" and "B":

(A) If other dates within said thirty day period are open the Exhibitor shall immediately select from such other open dates another date or other dates, failing to do so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B) If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B", the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified

in the schedule, shall begin upon the fifteenth (15th) day of the thirty day period specified in paragraph 2 of this Article.

3. The exhibition date or dates of any of the photoplays selected by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as though definitely specified in the Schedule.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

Loss of and Damage to Prints

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor

shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

Description and Titles of Photoplays—Reissues

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book, or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as respects any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are reissues from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

Assignment Upon Sale of Theatre

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; *provided*, that if the Exhibitor sells or disposes of his interest in the

theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

Exhibition and Advertising

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also agrees to advertise and announce each photoplay as "A Fox Movietone, Sound and Dialogue Production." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

Warranty as to Advertising

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor.

Taxes

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery and/or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association.

Minimum Admission Charge

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

Delay in or Prevention of Performance

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason

of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, *provided*, that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by sending after the expiration of such three (3) months' period to the other party notice in writing to such effect.

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver them to the Distributor or of any star or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived by the Exhibitor.

In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

Waiver

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party.

Arbitration

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 342 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee

appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city), all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration.

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto hereby waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the finding of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum

to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any, to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversey arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-second opposite the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition, the Distributor shall not be entitled to redress from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

Verbal Promises: Representation

NINETEENTH: *This contract is complete and no promises or representations have been made by either party to the other except as set forth herein.*

Option to Exclude if Group Licensed

TWENTIETH: If the license herein granted shall apply to an entire group of feature photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract up to but not exceeding ten per cent of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the same time the Exhibitor shall pay to the Distributor one-half of the license fee payable in respect of any such photoplay. In computing such ten per cent, fractions of less than one-half shall be disregarded. If any such photoplay shall, because of such exclusion, be thereafter licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited if not so excluded: then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the Distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor.

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition thereat shall be deemed to be the average daily gross receipts of such theatre during

the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

Racial or Religious Subject Matter

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the Exhibition thereof hereunder such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall specifically determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excepted from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor.

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to the public in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

Acceptance of Application

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by

the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor...

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date thereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter named then within the number of days specified immediately following the city hereinafter named nearest thereto) said application shall be deemed withdrawn and the Distributor shall forthwith return any sums paid on account thereof by the Exhibitor. Albany 10; Atlanta 20; Boston 10; Buffalo 10; Charleston 15; Charlotte 15; Chicago 15; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Northern New Jersey 7; Minneapolis 20; Butte 30; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 20; Omaha 20; Peoria 15; Philadelphia 10; Pittsburgh 14; Portland, Ore. 30; St. Louis 15; Salt Lake City 30; San Francisco 20; Seattle 30; Washington, D. C. 14.

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and

in the event of acceptance thereof as above provided, a duplicate copy, signed by the Distributor, shall be forwarded to the Exhibitor.

* DIRECTION TO SALESMEN: *While you have every right to trade among prospective customers to obtain the best offer possible for our product, after you have selected a particular exhibitor whose offer you believe to be the best obtainable and take a written application from such exhibitor, you are hereby directed to forward the application to the office of your company and make no further effort to sell the same service to any other exhibitor directly competing with such exhibitor until the application so forwarded has been duly rejected, accepted or withdrawn in accordance with its terms. A violation of this direction will subject you to discharge.*

Form E-782

FOX FILM CORPORATION
Executive Offices:
850 Tenth Avenue
New York City

BRANCH OFFICE COPY

WILLIAM FOX
MOVIETONE, SOUND AND DIALOGUE PRODUCTIONS
Contract No.....

Exchange—Mpls.

Salesman—Jack Lorentz

This agreement dated Sept 6—1929 is made between the Distributor and A. B. Muller (referred to in this agreement as the "Exhibitor"), operating the Rex Theatre, located at No.....Street, City (Town) of Maple Lake, State of Minn.

SCHEDULE

PHOTOPLAYS	Consecutive Days Run	A: Minimum Guaranteed License Fee per Photoplay	A: Gross receipts per Photoplay in excess of which Dist. shares	A: Dist. Percentage of excess	B: Synchronization and score charge	C: Aggregate of sums specified in columns A & B per photoplay	Exhibition Dates	DESCRIPTION
Prod. No.								
101 SUNNY SIDE UP ∨	2/3	$50	$200	50	$12.50	$62.50	....	Musical comedy with Janet Gaynor and Charles Farrell
102 CAMEO KIRBY ∨	2/3	50	200	50	12.50	62.50	....	Booth Tarkington's story in words and song with Norma Terris and J. Harold Murray
103 MARRIED IN HOLLYWOOD	2/3	50	200	50	12.50	62.50	....	Based on operetta by Oscar Straus featuring Norma Terris and J. Harold Murray
104 FOX MOVIETONE FOLLIES OF 1930 ∨	2/3	50	200	50	12.50	62.50	....	The 1930 edition of Movietone Follies
105 INTERNATIONAL REVUE Cheer Up and Smile ∨ Women Everywhere ∨	2/3	50	200	50	12.50	62.50	....	A sparkling revue with song, dance, music and spectacle
106 MELODIES OF 1930	2/3	50	200	50	12.50	62.50	....	An original musical comedy
107 AMERICAN BEAUTY REVUE Golden Calf ∨ High Society Blues ∨	2/3	50	200	50	12.50	62.50	....	Colorful, musical revue
108 PLAYMATES ∨	2/3	50	200	50	12.50	62.50	....	All talking & singing, with Janet Gaynor & Charles Farrell. Directed by Frank Borzage
109 The Cock Eyed World	2/3	50	200	50	12.50	62.50	....	

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	PHOTOPLAYS		Consecutive Days Run	A: Minimum Guaranteed License Fee per Photoplay	A: Gross receipts per Photoplay in excess of which Dist. shares	A: Dist. Percentage of excess	B: Synchronization and score charge	C: Aggregate of sums specified in columns A & B per photoplay	Exhibition Dates	DESCRIPTION
Prod. No.										
	Good Intentions	V	2/3	$50	$200	50	$12.50	$62.50	....	Based on famous Viennese Operetta by Leo Fall
110	The Dollar Princess								562.50	
111	Such Men Are Dangerous	V	2/3	35			12.50	47.50	....	Elinor Glyn's story
o 112	They Had to See Paris		2/3	35			12.50	47.50	....	Will Rogers portrays lead in Homer Croy's book
113	Will Rogers No. 2	V	2/3	35			12.50	47.50	....	Will Rogers—Title to be selected
o 114	Frozen Justice		2/3	35			12.50	47.50	....	Lenore Ulric and Louis Wolheim in a melodramatic story
115	Gringo Rose	V	2/3	35			12.50	47.50	....	Leonore Ulric
o 116	Lucky Star		2/3	35			12.50	47.50	....	Janet Gaynor, Charles Farrell and Frank Borzage
117	New Orleans Frolic	V	2/3	35			12.50	47.50	....	Stupendous singing and dancing musical show
118	The Sky Hawk	V	2/3	35			12.50	47.50	....	Based on Liberty Magazine story "Chap Called Bardell"
119	The Holy Devil	V	2/3	35			12.50	47.50	....	Based on book "Rasputin, the Holy Devil"
V 120	4 Devils	V	2/3	35			12.50	47.50	....	Janet Gaynor
									332.50	
o 121	Salute		2/3	30			10.00	40.00	....	Story of Annapolis and West Point, directed by John Ford
122	The Lone Star Ranger	V	2/3	30			10.00	40.00	....	Zane Grey's story
123	Well Dressed Man	V	2/3	30			10.00	40.00	....	Featuring Victor McLaglen
124	The Cisco Kid	V	2/3	30			10.00	40.00	....	Warner Baxter — directed by Raoul Walsh
o 125	The River		2/3	30			10.00	40.00	....	Charles Farrell, Mary Duncan—Frank Borzage director—story by Tristan Tupper
126	Why Leave Home	V	2/3	30			10.00	40.00	....	Musical comedy version of "Cradle Snatchers"
V 127	The Girl From Havana	V	2/3	30			10.00	40.00	....	With Lola Lane and Paul Page. Directed by Benjamin Stoloff
128	City Girl	V	2/3	30			10.00	40.00	....	Based on stage play "Mud Turtle," with Charles Farrell
129	Christina	V	2/3	30			10.00	40.00	....	Janet Gaynor

130	Harmony at Home	V	2/3	30		10.00	40.00	....	Musical comedy version of "The Family Upstairs"
								320	
131	Seven Faces	V	2/3	25		10	35.00	....	Based on story "Apes and Angels," by Richard Connell
132	Morals	V	2/3	25		10	35.00	....	A talking drama of ever present problems
133	Budapest	V	2/3	25		10	35.00	....	Story of the gay life of Hungary
134	Girl Who Wasn't Wanted	V	2/3	25		10	35.00	....	With Lois Moran
135	Hurdy Gurdy Man	V	2/3	25		10	35.00	....	Featuring George Jessel
136	Romance of Rio Grande	V	2/3	25		10	35.00	....	Based on Katherine Fullerton Gerould's novel
137	Big Time	V	2/3	25		10	35.00	....	Story of studio life in Hollywood, directed by Kenneth Hawks
138	Passing of the 3rd Floor Back	V	2/3	25		10	35.00	....	Based on Jerome K. Jerome's famous play
139	It Might Have Happened	V	2/3	25		10	35.00	....	Sensational story featuring Paul Muni
140	The Mad Musician	V	2/3	25		10	35.00	....	South sea story with Lois Moran
								350	
141	Listen to the Band	V	2/3	20		10	30.00	....	Musical jazz melange with Lola Lane, Sharon Lynn and David Rollins
142	Black Diamond	V	2/3	20		10	30.00	....	Musical Circus story, all star cast and including Stepin Fetchit
143	The Power House	V	2/3	20		10	30.00	....	Story of Machine Age influencing our lives
144	The Last Waltz	V	2/3	20		10	30.00	....	Broadway life, past and present
145	The Bells of Toledo	V	2/3	20		10	30.00	....	A musical romance of modern Spain
146	Song of Kentucky	V	2/3	20		10	30.00	....	Story of American turf
147	Three Sisters	V	2/3	20		10	30.00	....	A dramatic story of heart throbs and smiles
148	Street Corners	V	2/3	20		10	30.00	....	A story of restless, reckless youth
								240	
								1805.	

48
6

42 Licensed

The Exhibitor agrees to charge minimum admission prices to said theatre on the respective exhibition dates of the photoplays licensed hereunder as follows: EVENINGS: Adults, Orchestra.....Balcony.....Children, Orchestra.....Balcony..... MATINEES: Adults, Orchestra.....Balcony..... Children, Orchestra.....Balcony.....

ADDITIONAL TERMS:—

OKGL

APPROVED ADDITIONAL CLAUSES

ROAD SHOWS—The Distributor shall have the right to exhibit and/or cause to be exhibited as a "roadshow," at any time prior to the exhibition thereof hereunder, such of the photoplays licensed hereunder as the Distributor may from time to time select and determine, provided, however, that such roadshow exhibitions shall be at theatres at which admission prices for evening performances, during such exhibitions thereof, of not less than one dollar shall be charged for the majority of the orchestra seats, and further provided that, except in the cities of New York and Los Angeles, not more than two of such photoplays shall be so roadshown.

If any such roadshow exhibition shall be in the city of New York, N. Y., and if the Exhibitor's theatre be situated in a territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such photoplays) so roadshown in said City upon sending written notice to that effect to the Exhibitor not later than eight weeks after the commencement of such roadshow exhibition in such City, provided the Distributor shall by like notice except and exclude such photoplay from all other contracts containing this clause and licensing the exhibition of such photoplay in such territory. Such exception and exclusion shall not be affected in case the Distributor shall inadvertently omit to send such notice to any of such other exhibitors.

If any such roadshow exhibition shall be in the city of Los Angeles, Cal., and if the Exhibitor's theatre be situated in the territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such

photoplays) so roadshown in said City, upon the same terms and conditions above provided for the exception and exclusion of photoplays roadshown in the city of New York.

If and when any such roadshow exhibition (except any roadshow exhibition in New York and/or Los Angeles) shall be in the territory served by the Distributor's exchange or exchanges serving the Exhibitor's theatre, such photoplay so roadshown in such territory shall forthwith be excepted and excluded from this license. The Distributor shall send written notice to that effect, to the Exhibitor within fourteen (14) days after such roadshow exhibition commences.

The Distributor may so exercise such right to except and exclude any such photoplay from time to time, in the respective territories, as above defined, in the United States. Any photoplay so roadshown in any place in the United States, and not excepted and excluded from this license as aforesaid, shall not be deemed available for exhibition hereunder until after the completion of such roadshowing of such photoplay in the United States, and such photoplay shall be exhibited hereunder as and when available.

For each photoplay that the Distributor shall except and exclude, as aforesaid, the Exhibitor is hereby granted the option to except and exclude from this license one of the other photoplays licensed hereunder, but only if the Exhibitor shall give to the Distributor written notice to that effect not later than fourteen days before the date fixed for the exhibition hereunder of such other photoplay. The Distributor may exhibit and/or license the exhibition of any and all photoplays excepted and excluded from this license by the Distributor and/or the Exhibitor, as aforesaid, when and where desired by it, free from all claims of the Exhibitor in respect thereof.

PERCENTAGE BOOKINGS—If this contract calls for payment or any part thereof computed upon the Exhibitor's gross receipts, such payment or any part thereof shall be

made daily, together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates for each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor. Upon such date or dates an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine the Exhibitor's books and records insofar as they relate to such gross receipts. The Distributor, or its authorized representative, shall also have access for a period of sixty (60) days after the receipt by the Distributor of the final box office statement, to all of the Exhibitor's books and records for the purpose of verifying such box office statement. The Distributor agrees that any information obtained by it pursuant to the provisions of this Clause will be treated as confidential, except in any arbitration proceeding or litigation in respect of this contract. The Distributor agrees, unless such representative be a regular employee of the Distributor, not to employ as such representative any person a resident of or regularly employed in the place where the Exhibitor's theatre is located, excepting with the consent of the Exhibitor.

LIQUIDATED DAMAGES, PERCENTAGE BOOKINGS—If the license fee of any photoplay licensed hereunder is to be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such photoplay as provided in this contract, the Exhibitor shall pay to the Distributor as liquidated damages for each day that the Exhibitor fails or refuses to exhibit such photoplay (in addition to any fixed sums payable hereunder in respect of such photoplay) a sum equal to such percentage of the average daily gross

receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such photoplay should have been so exhibited, provided, however, that if the Exhibitor shall exhibit such photoplay for less than the full number of days provided for in this contract, such sum equal to such percentage shall be computed, upon a sum equal to seventy-five per cent (75%) of the gross receipts of said theatre for the last day of the exhibition thereat of such photoplay.

END OF SCHEDULE

IN WITNESS WHEREOF, the parties hereto have duly executed these presents.

No. of Pictures Offered: 48

No. of Pictures Contracted For: 48

Exhibitor: A. B. MULLER

By .....

Salesman: JACK LORENTZ

Approved

FOX FILM CORPORATION
JACK G. LEO

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed hereon instead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibi-

tion of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Forty-eight Movietone, Sound and Dialogue Productions under this contract not later than 2/28/30; to be played and/or paid for at the rate of not less than 4 per month.

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A. B. MULLER
Exhibitor

Approved

FOX FILM CORPORATION

By JACK G. LEO
Vice-President

Plaintiff's Exhibit B

[Page One of Exhibit B is identical with Page One of Exhibit A]

Form E-781 PAGE TWO

FOX FILM CORPORATION,
Executive Offices:
850 Tenth Avenue
New York, N. Y.

BRANCH OFFICE COPY

WILLIAM FOX *presents*

FOUR
CLARK AND McCULLOUGH
MOVIETONE COMEDIES

Contract No. .....

Exchange—Mpls Salesman—Jack Lorentz

This agreement dated Sept 6-1929 is made between the Distributor and A. B. Muller (referred to in this agreement as the "Exhibitor"), operating the Rex Theatre, located at No. ..... Street, City (Town) of Maple Lake, State of Minn.

SCHEDULE

Production No.	Successive Days Run	Guaranteed License Fee	Exhibition Dates — Month Dates	Description
KNIGHTS OUT	2/3	10		Two stage hands fall asleep and wake up in the days of King Arthur when they wore tin night-shirts.
ALL STEAMED UP	2/3	10		A couple of Turkish bath attendants get into hot water with the doctor's wife which burns the doctor up.
HIRED AND FIRED	2/3	10		The boys get jobs as butlers in a fashionable home and nearly wreck the place with their crazy antics.
DETECTIVES WANTED	2/3	10		Sherlock Holmes had nothing on these two gumshoes when it comes to finding the wrong clues.

Protection—Run

REMARKS

OK
JGL

END OF SCHEDULE

IN WITNESS WHEREOF the Distributor above named and A. B. Muller, the Exhibitor operating 6-7 days each week with 2-3 changes of program the Rex Theatre, located at ..... in Maple Lake, State of Minn., have executed this instrument, the 6th day of Sept., 1929, which upon acceptance by the Distributor shall be deemed to be the license to the Exhibitor for the exhibition of the photoplays specified in the Schedule in accordance with the terms hereof.

Exhibitor: A. B. MULLER

By.....
Salesman: JACK LORENTZ

Approved

FOX FILM CORPORATION
JACK G. LEO

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed hereon intsead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound,

to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays"

and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Clark and McCullough Movietone Comedies under this contract not later than 2/28/30; to be played and/or paid for at the rate of not less than one per month.

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A. B. MULLER
Exhibitor

Approved

FOX FILM CORPORATION

By JACK G. LEO
Vice-President

APPENDIX B

Extract from Petition in *United States v. Paramount*

VIII.

THE CONSPIRACY.

The defendants, each well knowing all the matters and things hereinbefore alleged, unlawfully have engaged in a conspiracy in restraint of said interstate trade and commerce in motion picture films so carried on as aforesaid by said defendant distributors, by said members of said defendant Film Boards of Trade, and by all said exhibitors of motion pictures in the United States, that is to say, in a conspiracy now here described in restraint of, and which throughout the period of time herein mentioned in fact unlawfully has restrained, and which now is restraining said interstate trade and commerce, to wit:

Since on or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors:

a. To coerce and to require every exhibitor of motion picture films in the United States to submit to arbitration any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures;

b. To coerce and to require every exhibitor of motion pictures in the United States to surrender and to waive the right to have any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the

exhibition of a motion picture or of motion pictures, settled and determined by any court having jurisdiction of such question or dispute;

c. To coerce and to require every exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding as aforesaid, without recourse or appeal to any court having jurisdiction of said question or dispute.

Since in or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors to carry out and to accomplish the aforesaid purposes and objects:

a. By refusing to enter into any contract with any exhibitor of motion pictures in the United States to license the exhibition of any motion picture and to transport, supply and deliver any motion picture film in the course of the aforesaid interstate trade and commerce, except on the terms and under the conditions (hereinafter specified) agreed upon by said defendant distributors;

b. By refusing to transport, supply and deliver in the course of the aforesaid interstate trade and commerce, any motion picture film to any exhibitor of motion pictures in the United States having a contract therefor, in the event of the failure or refusal of said exhibitor fully to comply with any term or condition (hereinafter specified) agreed upon by said defendant distributors.

All in the manner and by the means more particularly set forth hereinafter.

APPENDIX C

Decree in *United States* v. *Paramount*

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, *Petitioner,* *against* PARAMOUNT FAMOUS LASKY CORPORATION, *et al.,* *Defendants.*	E. 45-100.

DECREE

This cause having come on to be heard, and the Court having considered the evidence and the arguments of counsel, and having filed its Opinion herein on the 15th day of October, 1929, and upon motion of the petitioner by Charles H. Tuttle, United States Attorney for the Southern District of New York, and John Lord O'Brian, the Assistant to the Attorney General, and C. Stanley Thompson, Special Assistant to the Attorney General, of Counsel, for relief in accordance with the prayer of the petition, and the defendants having appeared by their attorneys, Cadwalader, Wickersham & Taft, and Edwin P. Grosvenor, Arthur L. Fisk, Jr., and Gabriel L. Hess, of Counsel; now, therefore, it is

ORDERED, ADJUDGED AND DECREED as follows:

I

That the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion

pictures throughout the United States the "Standard Exhibition Contract" dated May 1, 1928, which is attached to the petition herein as Exhibit "C" thereto, the adoption by the defendants of the "Rules of Arbitration" dated May 1, 1928, which is attached to the petition herein as Exhibit "G" thereto, and all the activities and agreements of said defendants by means of which they have collectively coerced adoption of and compliance with said "Standard Exhibition Contract" and said "Rules of Arbitration," constitute a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

II

That the defendants, their officers, agents, servants and employees, and all persons acting under, through or on behalf of them, or any of them, hereby are perpetually enjoined, restrained and prohibited, individually and collectively:

1. From further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the same purpose and/or effect as said conspiracy.

2. From doing any act or thing whatsoever for the purpose or with the effect of carrying out hereafter the purposes of said conspiracy, or any of them.

3. From entering into any agreement embodying the provisions of paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or the provisions of said "Rules of Arbitration" dated May 1, 1928.

4. From enforcing, directly or indirectly, any of the provisions of paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" dated May 1, 1928, against any exhibitor of motion pictures in the United

States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph.

5. From enforcing, directly or indirectly, any of the provisions of Rule IV, entitled "Enforcement of Decisions of Board of Arbitration," of said "Rules of Arbitration" dated May 1, 1928, against any exhibitor of motion pictures in the United States, on account of any claim, controversy or dispute arising under or on account of any existing contract licensing the exhibition of a motion picture or of motion pictures.

6. From demanding security from any exhibitor of motion pictures in the United States because of any failure or refusal to comply with any provisions of said paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" of May 1, 1928, contained in any existing contract licensing the exhibition of a motion picture or of motion pictures.

7. From retaining any sum or sums heretofore received in accordance with the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or said Rule IV entitled "Enforcement of Decisions of Board of Arbitration" of said "Rules of Arbitration" dated May 1, 1928, from any exhibitor of motion pictures in the United States, as security for the performance of any contract licensing the exhibition of a motion picture or of motion pictures.

8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph "Eighteenth" of said "Standard Exhibition Contract" of May 1, 1928, or of said "Rules of Arbitration" dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph

"Eighteenth" of said "Standard Exhibition Contract" or of said Rule IV of said "Rules of Arbitration."

9. From continuing to act upon and from entering into any understanding, arrangement, combination, conspiracy or agreement either to refrain from entering into any contract for licensing the exhibition of a motion picture or motion pictures, or to require the deposit of security as a condition for entering into or continuing to perform any such contract which has not been breached by the exhibitor, or to fix in advance any terms or conditions upon which any defendant or any member of any defendant Film Board of Trade shall enter into any such contract,—if the purpose or effect of such understanding, arrangement, combination, conspiracy or agreement is either:

(a) To coerce or to require any exhibitor of motion pictures in the United States to submit to arbitration any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures; or

(b) To coerce or to require any exhibitor of motion pictures in the United States to surrender and to waive the right to have any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any Court having jurisdiction of such claim, controversy or dispute; or

(c) To coerce or to require any exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding with any defendant or with any member of any defendant Film Board of Trade, arising under

or on account of any contract licensing the exhibition of a motion picture or of motion pictures, without recourse or appeal to any Court having jurisdiction of the claim, controversy or dispute occasioning said award.

III

Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree. Nor shall anything contained in this decree be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from selecting his or its own trade, from disposing of his or its own products, or from making any contracts with or without provisions relating to arbitration—all upon such terms as he or it may choose—provided such acts are done individually and without combining, conspiring or agreeing with any other defendant or any member of any Film Board of Trade.

Nothing contained in this decree shall be construed in derogation of the right of the defendants, or any of them, individually or jointly, to negotiate and to agree with any exhibitors of motion pictures on a standard form of contract to be used in licensing the exhibition of motion pictures or on any standard provision or provisions to be included in such license contracts, including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement.

Nothing contained in this decree shall be construed as limiting or modifying, or shall in anywise limit, restrict, modify or qualify, the Opinion filed in the companion case hereto, *"United States* v. *First National Pictures, Inc., et*

al." (In Equity No. 45-99), and the decree of the Court entered therein dismissing the petition of the Government on the merits as against the defendants herein; in which case it was held that the Rules and Regulations for the establishment and operations of a Credit Committee, annexed to said petition as "Exhibit A," as agreed to, adopted and enforced by these defendants, was not and is not in violation of the Sherman Anti-Trust Act, and that these defendants have not engaged in a combination or conspiracy to restrain trade or commerce in violation of said Act on account of their adoption and enforcement of and operation under said Credit Rules and Regulations.

IV

Jurisdiction of this cause is hereby retained for the purpose of enforcing this decree and making such other and further orders and decrees as may become necessary, and for the purpose of enabling any party hereto to apply to the Court for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree, or to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inadequate or inappropriate, or have become unduly oppressive to the defendants, and are no longer necessary to secure conditions in harmony with the law.

Dated: New York, January 21st, 1930.

(Sgd.) T. D. THACHER,
United States District Judge.